Board of Social Ministry d/b/a Green Acres Country Care Center Minnesota's Health Care Union, SEIU, Local 113, AFL–CIO/CLC, Petitioner. Cases 18–RC–16167[1] and 18–RC–16181

November 30, 1998

DECISION, DIRECTION, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in the election conducted in Case 18–RC–16181 on November 5, 1997, and the hearing officer's Report recommending disposition of them.[2]

The Board has reviewed the record in light of the exceptions and brief, and has adopted the hearing officer's rulings, findings,[3] and recommendations.

In adopting the Hearing Officer's finding that Janel McMahon was not shown to be a supervisor within the meaning of Section 2(11) of the Act, and thus was eligible to vote, we rely in particular on his findings that the night supervisor position in which McMahon supposedly exercised such authority was filled six nights out of every two weeks by licensed practical nurses and that the LPNs possessed the same authority with respect to employees on the night shift as did McMahon.[4] The finding of equivalent authority was based on the testimony of the Employer's own director of nursing. Since the Employer agreed that the LPNs (who voted in the election conducted in Case 18–RC–16167) were not supervisors within the meaning of Section 2(11), we believe it would be anomalous to find that whatever disciplinary authority is possessed by McMahon involves an exercise of independent judgment sufficient to make her a statutory supervisor. Contrary to our dissenting colleague, we do not think the fact that she regularly worked 8 nights in the position during each 2-week period differentiates her from the LPNs, given the finding that all had the same authority over employees.

With regard to the single instance in which McMahon sent an employee home without prior consultation with the director of nursing, she did so because the employee appeared to have been drinking. McMahon testified, without contradiction, that she had been instructed by the evening supervisor (an individual whom the parties agree is a statutory supervisor) that if a nurse suspected that an employee had been drinking, the nurse was to send the employee home or, if the employee disputed the charge, send the employee to the hospital emergency room for a blood test. Thus, in sending the employee home, McMahon was simply carrying out clear instructions of management, which left no room for genuine discretion. This incident therefore failed to establish that she possessed Section 2(11) authority. See, e.g., *Azusa Ranch Market*, 321 NLRB 811, 812 (1996) (telling employees when to go out on breaks not evidence of supervisory discretion where this was done pursuant to management instructions that breaks were to be allowed at approximately 2-hour intervals).

The dissent argues that McMahon possesses Section 2(11) disciplinary authority because she can effectively recommend warnings. We disagree. Contrary to the dissent's assertion, the record does not show that such warnings affect employee terms and conditions of employment. Although the employee handbook sets forth a four-step disciplinary policy, the handbook does not specify what is required to move from the first step (verbal warning) to the second step (written warning) and beyond (suspension and discharge). For example, there is no evidence that after receiving a verbal warning for violation of a rule, an employee would automatically progress to written warning and suspension for the second and third infractions, respectively. Neither is there any indication in the handbook's description of the procedure that, as our colleague asserts, "[a]bsent the initial stages, the more draconian measures of suspension and discharge cannot occur." Indeed, the handbook makes it clear that, in dealing with rule infractions or other unacceptable conduct, the Employer "reserves the right, in its complete discretion, to utilize any other procedure, or no procedure at all in dealing with such issues." Even after listing certain offenses that might ordinarily be punished initially by measures short of suspension or discharge, the handbook states again that "the facility reserves the right to terminate employment without prior warning for any reason if it believes that it is in the organization's best interest." Thus, verbal warnings issued by McMahon or any of the LPNs have no clear connection of any kind to other disciplinary measures. The mere authority to effectively recommend warnings that "have no tangible effect on [an employee's] job status . . . is not suffi-

[1] Pursuant to Stipulated Election Agreements, elections were conducted concurrently in separate units of employees at the Employer's facility, i.e., RNs in Case 18–RC–16181 and LPNs and other employees in Case 18–RC–16167. The Employer filed objections that encompassed both elections, and the Regional Director recommended that they be overruled. On January 28, 1998, while the Employer's exceptions to the Regional Director's report on objections were pending before the Board, the Employer filed a motion to withdraw those exceptions and (as clarified on January 30, 1998) its objections to the elections. The Employer's motion to withdraw its objections to both elections and its exceptions relating to them is hereby granted, and we shall issue a certification of representative in Case 18–RC–16167 inasmuch as the tally of ballots in that case shows 54 for and 32 against the Petitioner, with 12 challenged ballots, an insufficient number to affect the results.

[2] The tally of ballots in Case 18–RC–16181 showed 3 ballots cast for and 4 against the Petitioner, with 2 determinative challenges.

[3] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[4] The pertinent part of the hearing officer's report is attached as an appendix.

cient for supervisory status." *Lynwood Health Care Center, Minnesota, Inc. v. NLRB*, 148 F.3d 1042, 1046 (8th Cir. 1998).

Finally, with regard to McMahon's authority to call in off-duty nurses to work or to ask other nurses to stay beyond their shifts in order to alleviate staff shortages, we note that the record does not indicate that McMahon has any real discretion in the matter. It does not show that she is free to determine how many nurses are to work on a shift, or that, when there is a shortage, she could require a nurse to work as opposed to simply going down a list and asking until she finds a nurse who agrees to work. Similarly, with regard to her authority to assign duties to the certified nursing assistants, it appears that this is closely constrained by care plans devised for each patient. As to her authority to enforce dress code and safety rules, there is no evidence that she exercises supervisory discretion as opposed to simply applying clear pre-established guidelines. Thus, as in the case of the nurse sent home for drinking, McMahon appears simply to be implementing management's policy.

DIRECTION

IT IS DIRECTED that the Regional Director shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Joanne Peterson and Janel McMahon and serve on the parties a revised tally of ballots. Thereafter the Regional Director shall issue the appropriate certification in Case 18–RC–16181.

ORDER

IT IS ORDERED that Case 18–RC–16181 is remanded to the Regional Director for Region 18 for further processing consistent with this Decision.

CERTIFICATION OF REPRESENTATIVE IN CASE 18–RC–16167

IT IS CERTIFIED that a majority of the valid ballots have been cast for Minnesota's Health Care Union, SEIU, Local 113, AFL–CIO/CLC, and that it is the exclusive collective-bargaining representative of the employees in the following unit:

> All full-time and regular part-time NARs, medical records employees, dietary employees, laundry employees, housekeeping employees, maintenance employees, activities employees, nonsupervisory LPNs, van drivers and recreation therapy employees; excluding RNs, supervisory LPNs, department heads, guards and supervisors as defined in the Act.

MEMBER HURTGEN, dissenting in part.

Unlike my colleagues, I would sustain the challenge to Janel McMahon's ballot. I find her to be a supervisor.

McMahon is the only one of the Employer's 14 registered nurses who serves *regularly* as a "night shift supervisor" at the Employer's nursing facility.[1] There is a night supervisor on duty during all night shifts. During that shift, the night supervisor is the highest-ranking person on the premises. McMahon is the night supervisor on 8 nights out of every 2-week period.[2]

McMahon can, and does, effectively recommend verbal warnings. The Employer maintains a progressive disciplinary policy. The policy consists of four steps, the first of which is a verbal warning and the fourth of which is discharge.[3]

My colleagues acknowledge that there is a progressive disciplinary system. They also do not quarrel with the fact that McMahon makes effective recommendations with respect to the initial (warning) stages of this system. Finally, they accept the fact that the system can lead to suspension and discharge. Notwithstanding all of this, they argue that there is an insufficient link between the initial stages and the later stages (suspension and discharge). However, it is clear that the initial stages of discipline pave the way for later stages. Absent the initial stages, the more draconian measures of suspension and discharge cannot occur. Further, as noted above, McMahon makes effective recommendations as to discharge. In these circumstances, I conclude that there is a nexus between the initial stages of the system and the later stages.

I recognize that McMahon can only recommend the verbal warnings. The director of nursing reviews the matter before the night shift supervisor can issue the warning. However, the director has never overruled a nurse's decision to issue a verbal warning. The testimony of the director of nursing is unrebutted in this regard. Accordingly, the record establishes that McMahon has the authority to effectively recommend warnings.

In addition to the verbal warnings, McMahon drafts written warnings without obtaining prior approval. Although those warnings are also reviewed by the director of nursing, there is no suggestion that the night supervisor's recommendations have ever been overruled.

These warnings can affect terms and conditions of employment. As noted above, the warning is a first step on the road to discharge. Indeed, when it comes to that discharge step, the night supervisor is the person who makes the recommendation. The director of nursing testified

[1] "Night shift supervisor" is her title, I shall refer to her in that way or as "night supervisor."

[2] The Employer does not contend that the regular LPNs are supervisors, even though they act as night supervisors on the 6 nights (every 2 weeks) when McMahon is not present. However, since there are 12 LPNs, it follows that each of them acts as supervisor on an average of only once every 4 weeks. That occasional substitution does not place them in the same category as McMahon. In essence, McMahon and the LPNs have the same supervisory authority. However, McMahon has it on a frequent and substantial basis, and the LPNs have it on a sporadic and insubstantial basis. That is the difference which makes McMahon a supervisor and the LPNs employees.

[3] The other steps are: written warning and suspension.

that, as to discharge, she "would definitely weight [sic]" the recommendations of the night supervisors "very heavily." There is no suggestion that any discharge recommendation by night supervisors has ever been overruled.[4]

In addition to the power to make effective recommendations, McMahon can decide some matters on her own. McMahon, without first consulting with higher authorities, has sent home an employee whom she suspected of drinking.[5] She also issued a warning to a licensed practical nurse, documented the warning, and reported the nurse's refusal to accept the warning.

McMahon also has the authority to assign and reassign duties to certified nursing assistants and the authority to enforce work rules, including dress code and safety rules.

My colleagues suggest that the care plans for each patient dictate the actions of the night supervisor. In my view, care plans are not so specific as to turn the night shift supervisor into an automaton. Of necessity, the night shift supervisor must exercise discretions and independent judgment, albeit within the broad bounds of a care plan.

Finally, the night supervisor is the person who must give permission for an employee to leave early. If the employee leaves without permission, the employee would be disciplined.

Based on the above, McMahon is a statutory supervisor. Thus I would sustain the challenge to her ballot.

APPENDIX

HEARING OFFICER'S REPORT AND RECOMMENDATION TO THE BOARD ON CHALLENGED BALLOTS

Factual and Legal Analysis

In its posthearing brief, the Employer contends that under Minnesota law licensed practical nurses are not permitted to "supervise" certified nursing assistants; and that therefore the "[r]egistered nurses at [the Employer's facility] are responsible for supervising the [n]ursing [d]epartment personnel on their shifts, including the [t]rained [m]edical [a]ssistants and the [n]ursing [a]ssistants." Assuming without deciding that this is an accurate representation of state law, the Employer's argument leads to two equally untenable (from its perspective) conclusions. If registered nurses are, and licensed practical nurses are not, "supervisors" by operation of state law, the licensed practical nurses who serve as night supervisors six nights per pay period are not "supervisors." Since the director of nursing testified that the licensed practical nurses who serve as night supervisors have the same supervisory authority as does McMahon, it follows either that McMahon is likewise not a "supervisor," or that the licensed practical nurses who serve as night supervisors exercise "supervisory" authority in violation of state law. I conclude, however, that it is unnecessary to address this issue further for the simple reason that the Employer has failed to demonstrate that the term "supervisor" has a univocal meaning under federal and state law.

The Employer also contends in its post-hearing brief that night supervisors and evening supervisors occupy a similar status on the Employer's organizational chart; that the parties stipulated that evening supervisor June Poff is a supervisor within the meaning of the Act; that there is no principled basis for distinguishing between the supervisory authority of evening and night supervisors; and that therefore Janel McMahon must be a statutory supervisor. This argument simply proves too much. If, as the director of nursing testified, licensed practical nurses who serve as night supervisors have the same authority as the regular night supervisor; and if, as the Employer contends, the regular night supervisor is a supervisor within the meaning of the Act, it would follow that the licensed practical nurses who serve as night supervisors are supervisors within the meaning of the Act. However, the record establishes that the parties agreed that the licensed practical nurses were eligible voters (and therefore not supervisors within the meaning of the Act) in the election conducted in Case 18–RC–16167. Thus, the Employer's contention is inconsistent with its position in Case 18–RC–16167. In any event, and contrary to the Employer's contention, the record does provide a principled basis for distinguishing between the supervisory authority of evening supervisor Poff and night supervisor McMahon. Poff testified that she had the same the same supervisory authority as an evening supervisor as she previously had as a nurse manager (albeit limited to one rather than three shifts). However, the Employer does not contend, and the record does not otherwise establish, that the night supervisors have the same authority as the Employer's nurse managers. In addition, Poff, like the nurse managers but unlike McMahon and other night supervisors, is a salaried employee. Finally, Poff, unlike McMahon and other night supervisors, evaluates other employees.[7]

In its posthearing brief, the Employer contends that Janel McMahon is a supervisor within the meaning of the Act because she:

> (1) has the authority to give disciplinary warnings, and has actually exercised that authority; (2) has the authority to send employees home and has exercised that authority; (3) has the authority, under appropriate circumstances, to terminate employees; (4) has the authority to effectively recommend termination of employees; (5) has the ability to direct staffing issues, including calling employees in, and approving overtime; (6) has the discretion to determine when discipline is appro-

[4] Consistent with Sec. 2(11), the authority to effectively recommend discipline would show supervisory status, even if that authority were not exercised. *Northern Montana Health Care*, 324 NLRB 752 (1997), relied on by the hearing officer, is distinguishable in this regard. That case involved the authority to effectively recommend transfer, the exercise of which was "routine." Id. at 754. In contrast, the issuance of written warnings and the recommendations of termination in the instant case are not "routine."

[5] My colleagues argue that there is no discretion in this regard. Obviously, "suspicion of drinking" is not a precise phrase. Suspicions are personal, and there are degrees of "drinking." Accordingly, I believe that personal judgment by McMahon is involved.

[7] I have considered the director of nursing's testimony that she plans to have night supervisors evaluate employees in the future. However, and even assuming that these plans come to fruition at some unspecified time in the future, I am unwilling to speculate whether the performance of this function would be sufficient to confer supervisory status. *Northern Montana Health Care*, 324 NLRB 752, 753 (1997); *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 393 (1989).

priate; (7) is responsible for security issues; and (8) exercises supervisory authority and functions in the course of directing and assigning non-supervisory employees.

As the party asserting the existence of supervisory authority, the Employer bears the burden of persuasion on this issue. See, e.g., *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979). For the reasons that follow, I conclude that the Employer has failed to satisfy its burden.

(1) Authority to issue disciplinary warnings. The record establishes that Janel McMahon has the authority to issue verbal and written warnings. However, both the director of nursing and evening supervisor Poff testified that "all" nurses are "supervisors" and have this authority. Since the parties agree that the licensed practical nurses who voted in the election in Case 18–RC–16167 and the registered nurses who voted in the instant case (other than McMahon) are not supervisors within the meaning of the Act, the existence of this authority cannot be sufficient to confer supervisory status. Any doubt in this regard is eliminated by the director of nursing's testimony that she "always" reviews disciplinary warnings and that Janel McMahon could not take disciplinary action that would directly affect an employee's job status without her (the director of nursing's) involvement. Accordingly, I conclude that any authority Janel McMahon possesses with regard to issuing verbal or written warnings is insufficient to confer supervisory status. *Northcrest Nursing Home*, 313 NLRB 491, 497 (1993); *Lakeview Health Center*, 308 NLRB 75, 78–79 (1992).

(2) Authority to send employees home. The record establishes that Janel McMahon has the authority to send an employee home in circumstances involving abuse of a patient or intoxication, and that she in fact exercised that authority on at least one occasion. However, the Board has held that the authority to send an employee home in response to an egregious or flagrant violation of personnel policies, particularly in circumstances implicating patient safety or care, is insufficient to confer supervisory authority. *Riverchase Health Care Center*, 304 NLRB 861, 865 (1991). Moreover, on the one occasion that McMahon sent an employee home she simply followed the director of nursing's instructions as explained to her by Evening Supervisor Poff. Accordingly, I conclude that McMahon's conduct on this occasion is insufficient to establish that she exercised independent judgment or discretion in sending the employee home.

(3) Authority, under appropriate circumstances, to terminate employees. The director of nursing testified that night supervisors have the authority to terminate an employee in connection with physical abuse of a resident. However, she further testified that "I would always oversee what they have done"; that a night supervisor "would also need to run it [a decision to terminate] by me"; and that a decision to terminate "should always be run by me regardless." Thus, the director of nursing's testimony establishes that the night supervisors cannot take action that directly affects employee status without her direct involvement and review even in the extreme circumstance of physical abuse of a resident. Accordingly, and on the basis of the authorities cited above, I conclude that the limited authority testified to by the director of nursing is insufficient to confer supervisory status.

(4) Authority to effectively recommend termination of employees. The director of nursing testified generally that she would give great weight to a night supervisor's recommendation that an employee be terminated. The record does not contain any examples of such recommendations or how the Employer acted on them. This is "scant evidence" of the existence of supervisory authority. *Northern Montana Health Care*, 324 NLRB 752, 753 (1997). The director of nursing also testified that she would give the same weight to such a recommendation made by a licensed practical nurse as she would to one made by Janel McMahon. Since as previously noted the parties agree that licensed practical nurses are not supervisors within the meaning of the Act, I conclude that any authority McMahon has in this regard is insufficient by itself to establish supervisory status.

(5) Ability to direct staffing issues, including calling employees in and approving overtime. The record establishes that the night supervisors have the authority to call employees in to work, including in situations that would involve overtime pay; and to call a nursing pool. The record further establishes that this authority is limited to situations where additional staff are needed to cover shortages. However, the record fails to affirmatively show that the night supervisors exercise independent judgment or discretion in calling in employees or calling a nursing pool. Rather, the record establishes that Janel McMahon simply goes down the schedule and calls on call employees first in order to ensure that there are sufficient staff on duty to meet patient care needs. The performance of this function is routine in nature and does not require the exercise of independent judgment and discretion. It is therefore insufficient to establish supervisory status. *Lakeview Health Center*, 308 NLRB at 79.

(6) Authority to determine when discipline is appropriate. In response to the question whether "the night supervisor has any authority to excuse certain misconduct issues depending on the circumstances of the case?", the director of nursing responded, "Yes. On my discretion. She would need to communicate that to me." Thus, the director of nursing's testimony establishes that any discretion night supervisors have with regard to determining the appropriateness of discipline is subject to her review and determination; and that therefore the night supervisors do not exercise independent judgment and discretion in this regard.

(7) Responsible for security issues. The record establishes that the night supervisors have overall responsibility for maintaining the security of the Employer's facility. However, responsibility for maintaining the physical integrity of property is not, in itself, sufficient to confer supervisory status. *Graham Transportation Co.*, 124 NLRB 960, 962 (1959).

(8) Exercises supervisory authority and functions in the course of directing and assigning nonsupervisory employees. The record establishes that certified nursing assistants perform such duties as bathing, dressing, grooming, walking and repositioning residents; and that the duties certified nursing assistants perform on a daily basis are set forth in a daily care plan prepared for each resident. McMahon testified without contradiction that she tells the certified nursing assistants at the beginning of the shift what they are supposed to do; that the certified

nursing assistants generally know what they are supposed to do and require very little direction; that the duties of certified nursing assistants remain essentially the same from day to day; and that she actually spends approximately 15 percent of her time directing the work of certified nursing assistants. In these circumstances, I conclude that the record fails to affirmatively establish that McMahon exercises independent judgment and discretion in assigning and directing the work of the certified nursing assistants. *Northern Montana Health Care,* 324 NLRB, supra. See generally *Providence Hospital*, 320 NLRB 806 (1996).